RIAA vs. Corporate America

By Scott M. Hervey

On October 25, 2002, the Recording Industry Association of America, or RIAA as it is more commonly known, sent a shot across the bow of corporate America. In a letter to the CEOs and Presidents of the Fortune 1000 companies, the RIAA issued a thinly valued threat – take steps to stop illegal file swapping or face our legal wrath. The letter stated that the piracy of music and movies is taking place at a surprisingly large number of companies and that many corporate network users are taking advantage of the fast Internet connections to upload and download infringing files on peer to peer services as well as distributing and storing infringing files on corporate networks. The letter continued to state "[t]he use of your digital network to pirate music, movies and other copyrighted works…subjects your employees and your company to significant legal liability under the Federal copyright law." The RIAA sent a similar letter to various colleges and universities.

While the RIAA was successful in shuttering Napster, it was quick to find other online music swapping services popping up like weeds all over the Internet. The new breed of online music services is more like crabgrass; a peer to peer network with no centralized server. In the open network peer to peer model (i.e., Gnutella, Kazaa, iMesh and Grokster to name a few) anyone with an IP address can expand the network and no single computer or group of computers is necessary to keep it alive. Faced with this reality, the RIAA announced a change in its litigation strategy; it is going after individual users and those third parties who facilitate user access.

The issues concerning third party liability now being forced by companies and learning institutions were raised in the early history of the Internet. The challenges faced by Internet service providers when confronted with liability resulting from user's infringement are the best analogies to draw from in determining the potential liability companies and universities are now facing.

Although the Copyright Act imposes strict liability, cases such as Religious Technology Center v. Netcom (Netcom and a Netcom user were sued by the Church of Scientology because the user allegedly posted church copyrighted material on a Usenet newsgroup) have held that online service providers may not be held directly liable merely because infringing content has been posted online; some element of volitional conduct is required. Although companies and universities provide access to the Internet and, in some sense, facilitate or make possible the acts of infringement, where the conduct was outside the course and scope of the user's employment with the company/university, and where the conduct was not ratified by the company or university they probably would not face direct liability.

Even though direct liability may not be a risk, companies and universities may still be open to liability for contributory copyright infringement. Contributory copyright infringement can exist where a party, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another. In the Netcom case, in ruling on Netcom's motion for summary judgment, the court stated that triable issues of fact existed as to whether Netcom could be held liable for contributory infringement based the church providing Netcom with notice of the infringement and Netcom failing to investigate. While it is not likely that a court will find the RIAA's October 25, 2002 letter to constitute sufficient notice, companies and universities should pay serious attention to any further correspondence they may receive from the RIAA.

So what is a company or university to do? It may depend on whether the particular company or university can be considered a "Service Provider" under the Online Copyright Infringement Liability Limitation provisions incorporated into the Digital Millennium Copyright Act (DCMA).

The Online Copyright Infringement Liability Limitation section of the DCMA provides Service Providers with a safe harbor from liability which may otherwise result from a number of user acts, including information stored by a user on a Service Provider's system. Under the DCMA, a "Service Provider" is defined as "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received" and also as "a provider of online services or network access, or the operator of facilities therefore." While there has yet to be case law interpreting whether a university or a company qualifies as a "Service Provider," most commentators have noted that the term is defined broadly enough to encompass universities as well as owners of corporate intranets.

In order to be eligible for any of the limitations or safe harbors, a Service Provider must meet a few conditions. First, the Service Provider must adopt and implement a policy of terminating the accounts or subscriptions of repeat infringers; inform users and subscribers of the policy; and accommodate and not interfere with measures used by a copyright owner to identify or protect copyrighted works. The Service Provider must also designate an agent to receive notification of claims of infringement and comply with specific rules for removing or blocking access to content alleged to be infringing. The DMCA provides specific rules address appropriate Service Provider conduct in cases where content is removed in response to a notification. As long as the Service Provider complies with these rules, they are immune from liability to their subscriber for removal of the content.

The above provisions of the DMCA were drafted with the concept of a traditional ISP in mind; where the relationship between the user and the IPS revolved solely around the provision of Internet related services and the ISP and user were clearly two separate individuals. In the case of universities and their professors and staff and companies and their employees, it may not be as easy to separate the user from the "Service Provider." The DMCA provides that where a "nonprofit institution of higher education" is the Service Provider, a faculty member or graduate student who is employed by the institution will, in certain circumstances, be considered a person other than the institution and their knowledge of the infringing activity shall not be imputed to the institution. The DMCA does not provide any similar provision where the Service Provider is a company and the alleged infringer is an employee. However, the rules concerning the attribution of employee conduct to an employer are well established and may be applicable in determining whether an employee's infringing activity are to be imputed to the company.

Although a court has yet to address the application of the DMCA safe harbors to companies and universities, it would be well advised for companies and universities to act as if this portion of the DMCA had been written just for them. Companies and universities should immediately adopt (if they don't already have one) an Internet use policy which addresses the use of peer to peer networks and storage of content, and provides for termination or suspension of Internet access for violations of the policy. They should also designate an agent to receive infringement notifications and comply with the provisions of the DMCA addressing registration of the agent with the Copyright Office. While compliance may be cumbersome at times, if a company or university fails to take these steps, liability is almost certain.

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